



**Balancing the Freedom of Expression
and the Right to Privacy
in the GDPR era**

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Abstract

This dissertation was written as part of the LLM in Transnational and European Commercial Law, Banking Law, Arbitration/Mediation at the International Hellenic University.

The present thesis deals with the conflict between two fundamental rights of immense importance within the European Union, namely the right to the protection of personal data that derives from the vital right to privacy, against the right to freedom of expression. It begins with a brief description of the need for the adoption of the General Data Protection Regulation in the new modern era we live in, which is characterized by constant technological developments. An explanatory summary of “Privacy” and “Data Protection” and their safeguarding as two distinguished values will follow. Moreover, since this thesis will mainly focus on the conflict between the right to the protection of personal data and the right to freedom of expression, at the next stage the paper analyzes the concept of data protection and the basic notions, which the reader should be aware of for being able to understand this paper. Thereafter, the notion of freedom of expression and its notorious necessity in society shall be approached. Consequently, this thesis will investigate the different cases in which various European Courts have dealt with the conflict of the above rights and how they have set the priority of those to reach a fair balancing among them. Finally, it describes the interconnection of the abovementioned for reaching a comprehensive conclusion.

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Preface

The purpose of this dissertation is to approach the conflict between two fundamental rights of equal respect, the right to the protection of personal data and the right to freedom of expression, and the aim is to try to find a fair balancing among them. The GDPR era we live in along with the massive development of technology, and the easy expansion of media, increased this collision. That is the reason that motivated me to investigate the reconciliation of the right to privacy and the right freedom of expression in the GDPR era. The legal dogmatic methodology is employed in the research. The sources for this thesis consist of legislation, case laws, academic journals and interpretative works, such as the opinion issued by the Article 29 Working Party/ European Data Protection Board.

At this point, I would like to express my deepest appreciation to my supervisor Assist. Prof. Dr. Komninos Komninos that without his expertise and knowledge, the completion of this thesis could not have been possible. His willingness to advise and guide me whenever I needed, played a decisive role in this outcome. Furthermore, I would like to thank my family who believed in me during my studies and encouraged me in every step. Their love and pursuit were all I needed to achieve this goal.

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Introduction

Respecting human dignity and human rights, as well as safeguarding democratic society, liberty, fairness, and equal treatment are the main principles among European Union.¹ Within these principles and on the way to achieve them, exists the protection of fundamental rights and freedoms, highlighting the right to respect private life (or *privacy*), the right to data protection and freedom of expression, vital rights for a sustainable society.²

The fundamental right of privacy is often being confused with the right of data protection.³ Indeed, these rights are deemed to be the same because of their interconnection, but in fact they are distinguished values, protected separately within the Union.⁴ This paper will briefly summarize the aforementioned difference and then focus on the new standards of the right to data protection which plays an important role in our modern era.

However, considering that privacy and data protection are not standing alone as fundamental rights protected in the European Union, a high debate follows; this is whether those are absolute rights that can set limits to other fundamental rights. In this paper though, our consideration will be the conflict of privacy and data protection with the right to freedom of expression.⁵

This rapid changing era we live in accompanied by massive technological developments, creates challenges in our basic freedoms and fundamental rights; the dominant position of the internet in our everyday life affected the protection of private life of individuals and the processing of their personal data.⁶ Nowadays, because of this worldwide spreading of information technology, it is hard to limit the surveillance of

¹ Fact Sheets on the European Union, *The protection of fundamental rights in the EU*, European Parliament, 2019: <http://www.europarl.europa.eu/ftu/pdf/en/FTU_4.1.2.pdf>, accessed 1/10/2019

² European Data Protection Supervisor, *Data Protection*, <https://edps.europa.eu/data-protection/data-protection_en>, accessed 01 October 2019

³ European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Data Protection Law*, (Publications Office of the European Union, 2018), page 18

⁴ European Data Protection Supervisor, *Data Protection*, <https://edps.europa.eu/data-protection/data-protection_en>, accessed 01 October 2019

⁵ Kotsalis L./Menoudakos K, *General Data protection Regulation(GDPR)*, (Law Library 2018), page 70

⁶ European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Data Protection Law*, (Publications Office of the European Union, 2018), page 30

every kind of internet platforms, search engines, and public media that observe every online activity.⁷ This created a dilemma on how to tackle the situation that arose, taking into account the rights of both private interests and governmental ones, since this data processing affects social and economic activities.⁸ As a result, the General Data Protection Regulation (GDPR/ Regulation) has been adopted by the European Union to provide further protection of individuals' privacy.⁹ Since 1995 and before that adoption, Data Protection Directive 95/46/EC (Directive) was in place, providing harmonization of human rights in respect of their data processing and eliminating the borders for data transfer across the European Union.¹⁰ However, albeit the aim of the Directive to harmonize data protection standards, the adoption of different national laws by the Member States (MS) ended to a patchwork of laws, failing thus to comply with the Directive's objectives.¹¹ Alongside, the Directive could not fit our digital era since it left many things uncovered because of the expeditious technological development. As the world is evolving, it arises the need of updating almost every legal text that surrounds us. The solution seemed to be the GDPR, that is directly applicable to each MS. It came into force on 25 May 2018, after heavy lobbying to replace the Directive and raise the level of protection of personal data and legal certainty.¹² The GDPR follows the same line as the Directive but this direct application of it, promotes harmonization across the European Union regaining the trust that the fundamental rights are protected by a single pan-European law that can face the challenges of today in a consistent way.¹³

⁷ Human Rights Working Group, *The Human Right to Privacy and Personal Data Protection: Local-to-Global Governance in the Digital Era*, 2016 Research Project Human Rights Working Group, Law Schools Global League Preparatory Document for LSG Academic Conference, 2016, <<https://lawschoolsgloballeague.com/wp-content/uploads/2017/01/Human-Rights-Group-Paper-2016.pdf>>, accessed 02 October 2019

⁸ *Ibid*

⁹ Voigt, Paul/von dem Bussche, Axel, *The EU General Data Protection Regulation (GDPR)*, (Springer 2017), page 2

¹⁰ *Ibid*

¹¹ European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Data Protection Law*, (Publications Office of the European Union, 2018), page 30

¹² Voigt, Paul/von dem Bussche, Axel, *The EU General Data Protection Regulation (GDPR)*, (Springer 2017), page 2

¹³ *Ibid*

CHAPTER 1: PRIVACY vs DATA PROTECTION

1.1 Is the Right to Privacy the same with the Right to Personal Data Protection?

As aforementioned, we live in the GDPR era, where enterprises face new obligations referring to the protection of personal data in the light of the Regulation, but to define its scope of application, we need to specify a crucial part that leads to confusion and is essential for applying the GDPR. So here comes the question; is it privacy a synonym of personal data?

The right to privacy, according to William O. Douglas, an American jurist, and politician, is “*the beginning of all Freedoms*”¹⁴, and it has various dimensions and plentiful concepts.¹⁵ Indeed, this essential right could be considered as the root of multiple other freedoms branching the tree of fundamental rights.¹⁶ The right to privacy is protected not only in the European Convention of Human rights (ECHR) but also in the Universal Declaration of Human Rights (UDHR) and the European Charter of Fundamental Rights (the Charter).¹⁷ Apart from UDHR, which is recognized on an international level and it is protected against any intrusion, the right to privacy seems to be a major concern in the European Union as well. Apparently, through the article 8 of ECHR, which lies down the right to respect privacy, we can realize that the first part of it safeguards *private life, family life, home and correspondence* from any unwarranted interference, and having the second part of it specifying that this right is not absolute, but it is subject to the exceptions provided.¹⁸ Moreover, the Charter, is identical in substance with the ECHR in article 7, providing in the next article (art.8) another fundamental right corresponding to the right of privacy, the right to the protection of personal data, which will be discussed subsequently.¹⁹ The right to private life is protected under the constitution of each European country, and as a Cypriot citizen, I will briefly refer to article 15 of the Constitution of the Republic of Cyprus which also

¹⁴ *Public Utilities Commission v. Pollak* [1952], 343 U.S. 451

¹⁵ Privacy Information Basics: *The Importance of Privacy*, Royal Roads University, <<http://libguides.royalroads.ca/c.php?g=642866&p=4503946>>, accessed 02 October 2019

¹⁶ Human Rights, Views & Info, Privacy International, “The Right To Privacy And Why It Matters”, 2015, <<https://rightsinfo.org/the-right-to-privacy-and-why-it-matters/>>, accessed 02/10/2019

¹⁷ European Data Protection Supervisor, *Data Protection*, <https://edps.europa.eu/data-protection/data-protection_en>, accessed 01 October 2019

¹⁸ European Convention on Human Rights [1950] ETS 5, art 8, paras 1-2

¹⁹ Charter of Fundamental Rights of the European Union [2012] C326/02, art 7-8

protects private and family life against any interference, unless it is provided by law.²⁰ Article 15, derives from the European and International legislation having as a subject matter to safeguard and promote autonomous development of an individual's personality from any intrusion.²¹ The article 15.1 also includes the protection of personal data from unauthorized access, and this was implemented in the case *Johanna Kyprianou v. The Republic of Cyprus* where the Supreme Court of Cyprus ruled that personal belongings of the individuals are a matter of their private life and any disclosure of them challenges the given protection.²²

During the times, the right to privacy gained numerous interpretations, but one that summarizes the concept of privacy protection is defined as the *right to be let alone*.²³ Having the individuals' privacy protected is interlinked with having their autonomy, being able to decide which parts of their everyday life they want to keep away from the public eye and intrusion.²⁴ In respect of this right, they are the controllers of their feelings, thoughts, and habits, having the freedom to choose whether, or with whom they will communicate and what to share with. As the owners of their existence, they can make the decisions that surround their home or even their body.²⁵ In any case, we must not confuse the meaning of private life with a lonely or isolated life, precluding any other person from the private environment of the individuals; but the interpretation must include the right to be able to socialize with others that are not in their private sphere.²⁶ In a democratic society, privacy is vitally important for the individuals in implementing their duty as citizens while keeping their identity.²⁷

Undoubtedly, the right to privacy in the new challenging digital era has been enriched to meet the new standards of emerging technological developments.²⁸

²⁰ Constitution of the Republic of Cyprus [1960], art 15

²¹ Paraskeva, Costas, Cyprus Constitutional law: *Fundamental Rights&Freedoms*, (2015 Law Library), page 237

²² *Johanna Kyprianou v. The Republic of Cyprus through the Attorney General and others* [2006], 1920/2006

²³ Warren, Samuel/Brandeis, Louis, "*The Right to Privacy*", Harvard Law Review 1890, page 193

²⁴ Law. J. (2015) Oxford Dictionary of Law. Oxford: Oxford University Press

²⁵ Human Rights, Views & Info, Privacy International, "*The Right To Privacy And Why It Matters*", 2015, <<https://rightsinfo.org/the-right-to-privacy-and-why-it-matters/>>, accessed 02 October 2019

²⁶ Paraskeva, Costas, *Cyprus Constitutional law, Fundamental Rights & Freedoms* (2015 Law Library), page 239-240

²⁷ *Ibid*

²⁸ Human Rights, Views & Info, Privacy International, "*The Right To Privacy And Why It Matters*", 2015, <<https://rightsinfo.org/the-right-to-privacy-and-why-it-matters/>>, accessed 02 October 2019

Therefore, data protection has been found as an aspect of privacy, an explicit right for personal data protection, which in some legal texts is protected as a distinguished fundamental right, but some legal orders include it in the broad definition of privacy.²⁹ Although protection of personal data can be inferred from the right to privacy, it concerns us every time that personal data are being processed, regardless of the effect on privacy;³⁰ that is the reason that it has gained a separated protection in the European legal order that started in the 1970s aiming to limit the intrusion of the government and some companies, in processing personal data.³¹

The right to privacy and the right to data protection are often being confused as indistinguishable values, because the two of them aim to the self-determination of individuals' personality, retaining their morals, and being able to create their characters, express themselves and feel free, have their own beliefs without any coercion or pressure and develop relationships according to their likes.³² As mentioned above, the right to protect personal data is protected under article 8 of the Charter, apart from the right to privacy, and we can distinguish the two rights by their sphere of application, their composition, and their objective.³³ The guarantee of the right in article 8, is accompanied by the basic values of the protection of personal data as well as how and when they can be processed.³⁴ On that account by identifying the different concepts of those two rights, we conceive the right to data protection is a novelty right, which is into play nowadays and creates a system of protection of processing personal data by checking and balancing them. This processing system for being legitimate must be in accordance with indispensable prerequisites, and therefore we recognize the high protection that personal data have been obtained.³⁵ By contrast, the right to privacy, which comes into play whenever the individuals suffer a detriment in their private life or their personal interest, constitutes a general constraint in any intrusion that is not

²⁹ Flaherty, D., *Protecting privacy in surveillance societies: The federal republic of Germany, Sweden, France, Canada, and the United States*, 1989, Chapel Hill, U.S.: The University of North Carolina Press

³⁰ European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Data Protection Law*, (Publications Office of the European Union, 2018), pages 18-19

³¹ *Ibid*

³² *Ibid*

³³ *Ibid*

³⁴ *Ibid*

³⁵ European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Data Protection Law*, (Publications Office of the European Union, 2018), page 20

justified under the public interest exception.³⁶ Combinatorically, the term of private life gained broad interpretation taking into account each case's facts to decide whether an intrusion exists and if it is justified.³⁷

Considering the above, the right to respect private life and the right to protect personal data are fundamental values safeguarded under EU Law, but of different substance even though they are sometimes confused as the same. Yet, both are not absolute rights, and they must be reconciled with other Human Rights or be restricted under certain situations; a fair balance with the other fundamental freedoms is mandatory.³⁸ As said at the beginning, this thesis focuses on data protection and its conflict with the right to freedom of expression. Therefore, the following sections will explain in detail those two notions before trying to strike a balance between them.

CHAPTER 2: PERSONAL DATA

2.1 Protection of Personal Data

As discussed previously, the concept of personal data arises from the notion of privacy and together are crucial rights in retaining and boosting human rights and integral values; not only that, without their protection many other fundamental rights would not have standing.³⁹ The need for protection of personal data comes from the objective of avoiding their processing beyond what is essential, taking into account a proportionate, fair and legitimate aim on doing so.⁴⁰ In other words, data protection ensures their legal use, collection and, storage.⁴¹

2.2 Definition of Personal Data

Personal data is defined as every information that alone or with other information can lead to the identification of a natural person, directly or indirectly.⁴²

³⁶ *Ibid*

³⁷ *Ibid*

³⁸ European Data Protection Supervisor, *Data Protection*, <https://edps.europa.eu/data-protection/data-protection_en>, accessed 01 October 2019

³⁹ *Ibid*, accessed 12 October 2019

⁴⁰ *Ibid*

⁴¹ *Ibid*

⁴² Regulation (EU) 2016/679 of the European Parliament and of the Council, (General Data Protection Regulation) [2016], OJ L 119, art 4

Taking the exact wording, that information must be personal.⁴³ As the law states '*personal data*' means any information relating to an identified or identifiable natural person ('*data subject*')"⁴⁴. That means, a piece of information alone or different pieces of information collected together, that can identify an individual, is considered personal data. So, the core of what personal data is, stands the identification of the data subject; at the point in which we can no longer conceive the identity of the data subject, we no longer refer to personal data within the meaning of GDPR. We can find a wide range of what personal data is and there is not an ending, as jurisprudence adds more to what is deemed to be personal data according to each case that may be presented. A few examples of what is considered to be personal data are names, photos, location data, email address, home address, phone number, online ID, date of birth, ID number and any other unique characteristics indicating "*physical, physiological, genetic, psychic, economic, cultural or social identity of that natural person*".⁴⁵ The Court of Justice of the European Union (CJEU) defined what personal data is in the Case C-582/14 Patrick Breyer v. Bundesrepublik Deutschland, a milestone decision, which follows the Directive's definition in article 2(a) that is the same as the one adopted in GDPR. Although the Court was based on the Directive and its scope, in its interpretation it considered the present situation of modern society and the digitalization of the era.⁴⁶ IP addresses, albeit dynamic, according to the ruling of the CJEU, constitute personal data in the hands of the third party under specific conditions. The prerequisites for adopting the pre-mentioned is when those IP addresses, in conjunction with additional information, can lead to the identification of the person.⁴⁷ This can be considered as an indirect identification of the individual.⁴⁸ As said by the CJEU, the reasonable identification of a data subject can happen even when another third party has and can provide legally that additional information to the website operator.⁴⁹

⁴³ Voigt, Paul/von dem Bussche, Axel, *The EU General Data Protection Regulation (GDPR)*, (Springer 2017), page 11

⁴⁴ *Ibid*

⁴⁵ *Ibid*

⁴⁶ Case C-582/14, *Patrick Breyer v. Bundesrepublik Deutschland* [2016]

⁴⁷ *Ibid*

⁴⁸ European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Data Protection Law*, (Publications Office of the European Union, 2018), page 91

⁴⁹ *Ibid*

Moreover, subject to special protection under GDPR is, as they called, the sensitive personal data, a sub-category of personal data. Their sensitivity arises from the fact that if they are processed, the data subject might face risks, so their protection must be increased. Also, their processing can happen only under certain prerequisites.⁵⁰

2.3 Processing of Personal Data

Defining whether personal data are subject to protection, we must be aware of the notion of “processing”. As the law says, it is any procedure connected to personal data and can happen either with automated means or by humans.⁵¹ The operation that means processing, could be to collect the personal data of an individual, store them, alter them, put them in a structure, organize, or just record them. The procedure that could mean processing is a non-ending list which also contains the usage, the disclosure or deletion.⁵² Each case is unique, and the court will interpret the situation broadly.

To sum up, data protection nowadays is crucial as technological developments and globalization have an adverse effect on the processing of personal data. The massive data collection and their public sharing in a reckless way created the need for this further protection as it is being challenged by the constant changes of our digitalized era. This rapid changing world thus, generated the need for a more stable and sound system for personal data protection. Yet, the right to the protection of personal data and the right to privacy are not absolute rights and they may conflict with other human rights and European values. The most common interaction with personal data protection appears to be with the right to freedom of expression; therefore, it is necessary to reconcile with it, but also with the other fundamental rights and find a fair balance between them.⁵³

⁵⁰ *Ibid*, page 96

⁵¹ Regulation (EU) 2016/679 of the European Parliament and of the Council, (General Data Protection Regulation) [2016] OJ L 119, art 4 para 2

⁵² *Ibid*

⁵³ European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Data Protection Law*, (Publications Office of the European Union, 2018), page 24

CHAPTER 3: THE RIGHT TO FREEDOM OF EXPRESSION

Over the years and the evolution of our world in every aspect of life, the need for more intensive protection of Human Rights is manifest in order to improve the welfare of European citizens. One of the main elements of an effective democratic society is freedom of expression that not only enriches the liberty of a sustainable State but also is interlinked with the protection of other fundamental rights.⁵⁴ Lacking this right we may lead to adverse effects and nations of coercion, thus it gains protection on an international level.⁵⁵ According to the judgment of the ECtHR in the case of *Lingens v. Austria* the Court, noting the necessity of freedom of expression, stated that for a democratic society it is found to be one of the most important elements for development and creation of the path in the “*self-fulfilment of human beings*”.⁵⁶

As said in article 19 of the Cypriot Constitution, freedom of expression is found among the crucial rights in maintaining democracy, and it has a decisive role in the progress of the personality and spirituality of individuals.⁵⁷ Freedom of expression is guaranteed under article 10 of the ECHR and article 11 of the Charter, safeguarding the individual’s right to freely express opinions; a nearly absolute right. It is the right to collect and transmit information and ideas in the absence of any state intrusion.⁵⁸ The extension of this right is wide and includes any expression irrespective of its subject-matter.⁵⁹ The second part of the aforementioned is the most essential component in order to maintain democracy and political progress in every nation.⁶⁰ Nevertheless, the article sets out the situations that allow restrictions on the exercise of the right and that

⁵⁴ Bychawska – Siniarska, Dominika, *Protecting the Right to Freedom of Expression Under the European Convention of Human Rights*, Council of Europe, (July 2017), <<https://rm.coe.int/handbook-freedom-of-expression-eng/1680732814>>, accessed 20 October 2019

⁵⁵ Heller, Brittan/van Hoboken, Joris, *Freedom of Expression: A Comparative Summary of United States and European Law*, (May 2019), The Carr Center for Human Rights Policy, Harvard University Vrije Universiteit Brussels and University of Amsterdam, <https://www.ivir.nl/publicaties/download/TWG_Freedom_of_Expression.pdf>, accessed 20 October 2019

⁵⁶ *Lingens v Austria* [1986] 8 EHRR 407

⁵⁷ Paraskeva, Costas, *Cyprus Constitutional law: Fundamental Rights&Freedoms*, (2015 Law Library), page 296

⁵⁸ Bychawska – Siniarska, Dominika, *Protecting the Right to Freedom of Expression Under the European Convention of Human Rights*, Council of Europe, July 2017, <<https://rm.coe.int/handbook-freedom-of-expression-eng/1680732814>>, accessed 20 October 2019

⁵⁹ Synodinou, Tatiana-Eleni/Jogleux, Philippe/Markou, Christiana/Prastitou, Thalia, *The Eu Internet Law, Regulation and Enforcement*, (Springer 2017), page 377

⁶⁰ *Ibid*

any interference can happen only when these are lawful and unavoidable.⁶¹ We cannot disregard the provisions laid down in the second paragraph of the said article, stating that the right to freedom of expression bears duties and responsibilities. Those obligations deriving by it, set limits to that right once other fundamental rights come into play. However, nowadays that massive independence of transmitting information through media can create a hazard when disclosing sensitive facts, especially of public persons, coming into conflict with the right to protect private life.⁶² Hence, any activity based on the article, namely freedom of press, surfing websites, access to information and much more, must be in a fair balance with other fundamental rights that may strike with; and as mentioned before, a main struggle is with the right to private life, which consequently is extended to personal data protection, especially in our digital era. Due to this, a core question occurs: “Can private life set limits to freedom of expression?”

CHAPTER 4: ARTICLE 85 GDPR

As already stated, the right to the protection of personal data as well as freedom of expression are both fundamental rights that are subject to protection under European Law and are indispensable values for a democratic society. But the problem comes to the surface when those two rights must face each other, and a conflict is unavoidable. Which one should prevail or be protected?

The GDPR in order to find a common link between those two rights, introduced article 85 which aims to find a fair balance in exercising them.⁶³ This article leaves the discretion to the MS to define what is deemed to be the right balance;⁶⁴ which may mean that while a MS allows the processing of specific data to enable freedom of expression and information to be exercised, another MS may forbid this.⁶⁵ More

⁶¹ *Ibid*

⁶² Paraskeva, Costas, Cyprus Constitutional law: *Fundamental Rights&Freedoms*, (2015 Law Library), page 304

⁶³ European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Data Protection Law*, (Publications Office of the European Union, 2018), page 56

⁶⁴ Regulation (EU) 2016/679 of the European Parliament and of the Council, (General Data Protection Regulation) [2016] OJ L 119, art 85

⁶⁵ Gabel, Detlev/Hickman, Tim, Chapter 17: *Issues subject to national law – Unlocking the EU General Data Protection Regulation*, April 2019, <<https://www.whitecase.com/publications/article/chapter-17-issues-subject-national-law-unlocking-eu-general-data-protection>>, accessed 24 October 2019

precisely, MS have the right to deviate from specific sections of GDPR to find a balance for the abovementioned rights for reasons of journalism, expression through arts and literature or academic expression, as long as they are essential.⁶⁶ The justification for allowing MS to have the margin of appreciation is based on the differences in each legal order and the special interpretation of the nations for what freedom of expression is and specifically journalism. Furthermore, recital 153 of GDPR provides more exact explanations for possible exceptions by the nations with a view to ensure a higher standard for the protection of freedom of expression, emphasizing again the need of striking a balance between the fundamental rights. Thus, MS must provide any exemptions and derogations in their legislation that are necessary to achieve this balance, according to their unique needs.⁶⁷

Cyprus, consequently, to conform with GDPR rules of article 85, adopted article 29 of Law 125(I)/2018.⁶⁸ To comply with the discretion given, the Cypriot legislator laid the aforementioned article stating that in the case of data processing linked with criminal convictions and offences, and also processing personal data or sensitive personal data when is performed for the need of expression in any form (such as journalism, arts, and literature or academic aims), this processing is allowed.⁶⁹ Nevertheless, this permission for processing is subject to certain conditions; it must respect the principle of proportionality and also the fundamental rights and freedoms under the European Union that provides their safeguarding.⁷⁰ Also, the Law refers to articles 14 and 15 of the Regulation, noting that if they interfere with the right to freedom of expression and information or journalistic integrity, they will not be applicable.⁷¹ Due to the recent adoption of this Law, it has not been used extensively yet, but as we find ourselves in the GDPR era, it will be subject to consideration in many upcoming cases.

⁶⁶ European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Data Protection Law*, (Publications Office of the European Union, 2018), page 54

⁶⁷ Regulation (EU) 2016/679 of the European Parliament and of the Council, (General Data Protection Regulation) [2016] OJ L 119, Recital 153

⁶⁸ The Protection of Individuals with regard to the Processing of Personal Data and the Free Movement of such Data Act of 2018, [2018] 125(I)/2018, art 29 para 1

⁶⁹ *Ibid*

⁷⁰ *Ibid*

⁷¹ *Ibid* article 29 para 2

Interpreting article 85, we recognize that the Regulation adopts the idea that freedom of expression and the right to the protection of personal data are equivalent rights and that is the reason that there is an overriding requirement to find a balance between them; none of the two rights is prevailing over the other and in every judgment there must be a consideration of the special facts of each case. What is considered as a right or fair balance is intricate and the GDPR gave the authority to national courts to define the fairness in that matter.⁷² Ever since the beginning of the existence of the two rights the jurisprudence of the courts was contradicting and in order to balance the rights to data protection and freedom of expression, a careful examination of the judgment of each court in the different cases must be done. In respect of the above, the next chapter will be divided into three parts; How the CJEU addressed the above conflict, the findings of the ECtHR when the rights to data protection and freedom of expression were at stake, and the final part will be the balancing by the Cypriot Data Protection Commissioner of those Fundamental Freedoms.

CHAPTER 5: PRIVACY AND PERSONAL DATA vs FREEDOM OF EXPRESSION

5.1 The approach of the CJEU

5.1.1 Case *Tietosuoja- ja valtuutettu v. Satakunnan Markkinapörssi Oy and Satamedia Oy* (C-73/07)

As mentioned above, according to the reconciliation of freedom of expression and the right to data protection, the jurisprudence of the courts varies; a case-by-case assessment must be done for this balancing exercise. One of the landmark cases where the CJEU examined the conflict between the above was the case *Tietosuoja- ja valtuutettu v. Satakunnan Markkinapörssi Oy and Satamedia Oy*. This case took place before the creation of the GDPR and the CJEU was based on the Directive that was in force at that time.⁷³ Nevertheless, having in mind the similarities of the Directive with the Regulation, the Court could act similarly today.

⁷² Regulation (EU) 2016/679 of the European Parliament and of the Council, (General Data Protection Regulation) [2016] OJ L 119, art 85

⁷³ European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Data Protection Law*, (Publications Office of the European Union, 2018), pages 54-55

The facts of the case are as follows. In Finland, two existed enterprises, named Satakunnan Markkinapörssi Oy and Satamedia Oy, were owned by the same person. Those companies were collecting tax data that were available in a public domain and they were aiming to publicize that tax information in a local newspaper. Following that, Satamedia started providing those tax information through an SMS service.⁷⁴ Data Protection Ombudsman of Finland required the termination of this service by Satakunnan and Satamedia, arguing that this was a violation of the right to protect personal data.⁷⁵ The companies refused to comply with the request, arguing that an exception existed to the Data Protection Act of Finland and in particular, the journalistic exception. In accordance, the Data Protection Board dismissed the request for stopping the service because it was challenging the right to freedom of expression as provided by the act. Following this, the Ombudsman appealed, and the case reached the CJEU for a preliminary ruling, asking for the interpretation of “journalism”, under the Act.⁷⁶

First of all, to define if there was a fundamental right in challenge, the CJEU reassured that what the two companies were doing, was processing of personal data under article 3 of the Directive, irrespective of the fact that the given information was publicly available.⁷⁷ The CJEU pointed out the necessity of freedom of expression for a democratic society and thus the interpretation of any activity within this right should be interpreted widely. On the other side, as ruled, exemptions from the right for the protection of personal data are notoriously limited to what is inevitable.⁷⁸ Defining thus the notion of journalistic activities, the court ruled that the service could be considered as described only *“if their object is the disclosure to the public of information, opinions or ideas, irrespective of the medium used to transmit them.”*⁷⁹ Also the CJEU noted that journalism is not restricted to media companies but to every individual that is committed in journalistic activities and can act that way, either having a profit or not.⁸⁰ At the same time the CJEU left the final decision to the national court to define whether

⁷⁴ Case C-73/07, *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [2008], ECR I-09831, para 25 and 29

⁷⁵ *Ibid* para 31

⁷⁶ *Ibid* para 34

⁷⁷ *Ibid* para 37

⁷⁸ *Ibid* para 56

⁷⁹ *Ibid* para 61

⁸⁰ *Ibid* para 58

those activities could be undertaken as journalistic.⁸¹ In light of this, the Finnish Supreme Court applying the CJEU ruling, ordered the two companies to cease the service. Hence, the companies alleging infringement to their freedom of expression referred to the ECtHR,⁸² but the ECtHR following the CJEU's preliminary ruling, even if it found interference within the right to freedom of expression, stated that this interference was justified.⁸³ Although there was a violation in the right of imparting information, banning their collection and processing, was legal, essential and legitimate. As the ECtHR explained, the legitimate purpose that allows derogations in the right of freedom of expression, existed under Data Protection, is to protect the rights of others or their fame.⁸⁴ Moreover, the necessity subject to a democratic society was not justified, as the exception stands only when a public interest exists, but in this case, the massive amount of information collected exceeded the substance of journalistic activities. As the ECtHR ruled, the notion of journalism includes purposes of disseminating information and in this case, this was not the fact as the activities of the two companies aimed only to calm the thirst of the society about the tax information of others. The ultimate goal of ECtHR was to seek a balance between freedom of expression and the right to the protection of personal data and provide guidance to national courts in this matter.⁸⁵

In conclusion, the ECtHR to its ruling noted that the public interest was driven by the curiosity of third parties, interfering thus in the private life of others. In this case, the personal data protection prevailed, as the interference found in the fundamental right of freedom of expression was justified and legitimate.⁸⁶ As it stands, despite the fact that the jurisprudence in this case happened before the creation of GDPR, the court would have reached the same results because of the existence of similar interpretations; the bridge in article 85 of GDPR between data protection and freedom of expression states that the discretion for finding a balance among the striking rights, it is up to the MS. Likewise, back then the findings for a justified interference in the right to freedom

⁸¹ *Ibid* para 65(2)

⁸² *Ibid* paras 21-25

⁸³ *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* App no.931/13 (ECHR 27 June 2017), para 198

⁸⁴ *Ibid* para 72

⁸⁵ Voorhoof, Dirk, Ghent University, Human Rights Centre, *No journalism exception for massive exposure of personal taxation data*, July 2017, <<https://strasbourgobservers.com/2017/07/05/no-journalism-exception-for-massive-exposure-of-personal-taxation-data/#more-3801>>, accessed 28 October 2019

⁸⁶ *Ibid*

of expression are a result of the strict explanation of journalistic activities and the broad discretion of national bodies.⁸⁷

It was inevitable that the ruling of the CJEU and ECtHR, would generate criticism and questioning whether there was a proper balance between the conflicting fundamental rights that deserve special protection. The complexity of the case and the need for equal respect of the two rights leads to different perspectives on how to reconcile freedom of expression with the protection of personal data. The biggest concern of some is that the data which generated the conflict was already publicly available, and the applicants used those published data. As a result, what they did was just to circulate the taxation data and facilitate their access. The taxation data were already disclosed for transparency reasons under the Finnish Law and nevertheless, the actions of the two companies would not be able to cause further damage to privacy protection.⁸⁸ Taking the above into consideration, if people were unaware of the court's ruling and interpretation, they could lean in favour of the applicants and the existence of a violation of their right to collect and process already publicly available information; thus a breach of article 10 ECHR. However, this is not the case. In reading the court's decision, there was a clear understanding of the delicacy of this matter, and when striking a balance, powerful grounds must exist. The court reasonably explained that having those data publicly available does not extract the individuals' protection for maintaining their privacy.⁸⁹ Such massive collection and publication of data went beyond the essential and the public interest consideration diminished, as curiosity arose.⁹⁰ As said, the purpose of the publication could not be deemed anymore as journalistic as it did not contribute to the public interest.⁹¹ Hence, there was lack of violation of the applicant's rights. In conclusion, as we can assume from the above study, priority is given to the right of personal data protection. This is obvious because the Directive provides for a default standard, and derogations on that can happen only

⁸⁷ *Ibid*

⁸⁸ *Ibid*

⁸⁹ Case C-73/07, *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, [2008], ECR I-09831, para 134

⁹⁰ *Ibid* paras 175-176

⁹¹ Voorhoof, Dirk, Ghent University, Human Rights Centre, *No journalism exception for massive exposure of personal taxation data*, July 2017, <<https://strasbourgobservers.com/2017/07/05/no-journalism-exception-for-massive-exposure-of-personal-taxation-data/#more-3801>>, accessed 28 October 2019

under special exemptions; and in the above case, the exemption of journalism could not be justified.

5.1.2 Google Spain SL Google Inc. v Agencia Española de Protección de Datos (AEPD) Mario Costeja González

Another landmark case referring to the conflict of data protection and privacy versus Freedom of expression was examined in the well-known case “Google v. Spain”. In this case the complainant, Mr. Gonzalez requested from a newspaper, Google Spain and Google Inc. to delete personal data that were related to his name, revealing financial problems. The publication that was found on the search results to Mr. Gonzalez’s name, was involving his house in auction proceedings, although terminated years ago. On that base, Mr. Gonzales asked for the erasure of the aforementioned announcements as they were irrelevant and inaccurate, and thus interfering with his fundamental rights of privacy and data protection.⁹² The Data Protection Authority upheld only the claim regarding Google and subsequently ordered them to delete the links to make those data inaccessible.⁹³ Therefore, Google Spain and Google Inc. appealed, and the case was found before CJEU to clarify the questions that arose. Among others, the CJEU made clear that in our digital era, data controllers must keep the data protected, in a way that they ensure to the data subjects the safeguarding of their fundamental rights, following the Directive’s obligations.⁹⁴ The search engines, as processors, must comply with their legal responsibilities without exceeding the essential and preserve precise data in their publications. As the identification of the data subject is possible in our age because of the technological boom, the details provided must comply with the law. Meaning, the processing of personal data is possible when legitimate interest exists by third parties or the data processor or controller, and if it is compulsory to succeed the purpose needed. Yet, this is not absolute, it must be balanced with other conflicting rights of the

⁹² Lynskey, Orla, *Control over personal data in a digital age: Google Spain v AEPD and Mario Costeja Gonzalez*, The Modern Law Review 2015, page 522 et seq.

⁹³ *Ibid*

⁹⁴ Case C-131/12, *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, [2014] ECR I-000, para 38

individual.⁹⁵ Considering this, the sensitive nature of Mr. Gonzalez’s data and as the bankruptcy proceedings happened years ago and did not have a legal basis anymore because his house was repossessed, there was no legitimate interest for the processing at the time when Mr. Gonzales objected to the announcements.⁹⁶ On the grounds of the CJEU findings, search engines like Google, which determine how and why personal data will be processed, are regarded as controllers and not just processors, and they are obliged to comply with the right to personal data protection and erase any data that are outdated, or they no longer have legitimate interest.⁹⁷ And the question that stands, keeping in mind the CJEU’s ruling is if the data subject has the right to object, “the right to be forgotten”. The individuals unquestionably under the Directive 95/46 have the explicit right not to accept the exposure of their personal data and if the data are already disclosed, under specific circumstances, they can request the removal of data containing their personal information.⁹⁸ This legitimate interest of individuals comes into play whenever that information is *“inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes of the processing at issue carried out by the operator of the search engine”*⁹⁹. Hence, this is a qualified right that arises from the right of privacy and personal data protection and must be reconciled with other fundamental rights. In the abovementioned case, a balance must be sought with the right of freedom of expression, and more precisely with the right to be informed.¹⁰⁰ Consequently, this enactment provides a right to the data subject and a duty for the controllers, which yet must strike the right balance based on the analysis of the facts of each case. The harmonization of the fundamental rights of freedom of expression and information by

⁹⁵ Kakavoulis, Konstantinos, *The case Google Spain v. AEPD and Mario Costeja Gonzalez of the Court of Justice of the European Union: A brief critical analysis*, June 2018,

<<https://www.homodigitalis.gr/en/posts/2900>>, accessed 30 October 2019

⁹⁶ De la Torre, Lydia F, *Google Spain & the Right to be Forgotten*, June 2017,

<<https://medium.com/golden-data/google-v-spain-the-right-to-be-forgotten-a4ee50dae43c>>, accessed 30 October 2019

⁹⁷ Kranenborg, Herke, *Google and the Right to be Forgotten*, 2015,

<https://edpl.lexxion.eu/data/article/7245/pdf/edpl_2015_01-014.pdf>, accessed 30 October 2019

⁹⁸ Kakavoulis, Konstantinos, *The case Google Spain v. AEPD and Mario Costeja Gonzalez of the Court of Justice of the European Union: A brief critical analysis*, June 2018,

<<https://www.homodigitalis.gr/en/posts/2900>>, accessed 30 October 2019

⁹⁹ Case C-131/12, *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, [2014] ECR I-000, para 5

¹⁰⁰ European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Data Protection Law*, (Publications Office of the European Union, 2018), page 91

having the right to access them, with the right to the protection of privacy and personal data protection is problematic as both rights are subject to equal respect.¹⁰¹ The disclosed information is one of the thoughts that must be considered when the courts try to reach a fair balance. What is important regarding the information, is their effect on the private life of the data subject and how sensitive that information is in terms of this. Furthermore, the public interest is another factor which determines, when in question, whether a piece of information could be a subject for objection; if there is no public interest in the given case, the right to reveal any information will be set aside before the right to personal data protection. However, if the information is related to public persons or has a public interest, it can justify access without violating the human right of privacy.¹⁰²

This significant case was also subject to a lot of criticism for the lack of addressing the consequences to the right of freedom of expression.¹⁰³ Yet, having studied the case, the right to be forgotten of the data subjects, the right to object and the right to have their data erased from search engines such as Google, go hand in hand with the right of freedom of expression and information. Despite that the CJEU focused on the implications regarding the existence or not of public interest, having a search engine operator, which is today the main actor in disseminating information, extraction of this right from it, following the fundamental right of individuals to protect their personal data, is just as simple as that; we again find in conflict the right to freedom of expression and the right to data protection. Search engines can be accessed from anywhere in the world and the deletion of publicized information from those engines, takes away their right to inform and consequently their right to freedom of expression. Thus, the balancing must be adequate and powerfully reasonable. Forgetting the public interest issue in that case, I consider that the right to the protection of personal data would and should prevail. As extensively said, a case-by-case analysis must be done, and in Google case, Mr. Gonzalez had overriding rights against the search engines.¹⁰⁴ The sensitivity of

¹⁰¹ *Ibid* page 57

¹⁰² *Ibid*

¹⁰³ Lynskey, Orla, *Control over personal data in a digital age: Google Spain v AEPD and Mario Costeja Gonzalez*, *The Modern Law Review* 2015, page 522 et seq.

¹⁰⁴ Opinion of Advocate General Jaaskinen in Case C-131/12, *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* [2014] ECR I-000, para 81

the information linked to his name speaks for itself, especially in the GDPR era and its deriving obligations, where data subjects must be respected and protected, yet not absolutely; a balance must be sought. Nevertheless, the CJEU may not have focused on the implications to the right of freedom of expression but noted that controllers of such search engines are not subject to the journalistic exception of the Directive.¹⁰⁵ It also emphasized their higher obligation against any simple publisher because, as mentioned before, the intrusion on personal data protection and private life is more intensive.¹⁰⁶ Bearing in mind the criticism for the failure of the court to address the issue of freedom of expression, given the above, in an indirect way, it seems to address the conflict between the two fundamental rights. The effective protection of any fundamental right is mandatory regardless of the type of the court that faces the difficulty of their balancing, and for fulfilling this obligation in the era of GDPR, the legislation left the final balancing to the MS. Google Case, in contrary to other cases, it is unambiguous as to which right should prevail, and taking into account today's norm to decide, the protection of personal data would override the internet users' interest. The digital profile of the individuals through the internet gave rise to the new Regulation to further and explicitly enrich the protection of private life, establishing thus the "*Right to be Forgotten*", under certain criteria.¹⁰⁷

5.1.3 Google v. CNIL and G.C. and Others v. CNIL

Nevertheless, "Google Spain" Case, opened the path for many controversial issues that have arisen as a result of the recognition of the "Right to be Forgotten" through the above judgment. One of the issues that came to the surface is the global application of this right. Thus, in Case C-507/17, Google v. CNIL, the CJEU tried to interpret the territoriality of this right to clear the confusion of the national courts.¹⁰⁸ In Case C-507/17, Google was asked by the French Data Protection Authority (CNIL) to remove personal data that were displayed to the search results of its engine, following

¹⁰⁵ *Ibid* para 85

¹⁰⁶ *Ibid* paras 86-87

¹⁰⁷ Regulation (EU) 2016/679 of the European Parliament and of the Council, (General Data Protection Regulation) [2016] OJ L 119, art 17

¹⁰⁸ Case C-507/17, *Google v. CNIL* [2019] ECR 15, para 39

the individual's request.¹⁰⁹ However, the notice for removal of those data contained the deletion of the data from the domain names globally and not only within the MS.¹¹⁰ And that was the reason for Google's refusal, which found itself responsible for de-linking only the results from the domain names related to the MS.¹¹¹ The imposition of a penalty for this failure of Google to fully comply with the CNIL's request resulted in the challenging of the territorial scope of the Right to be Forgotten before the CJEU.¹¹² Examining the referred questions the CJEU firstly noted that the right to de-referencing is recognized under EU Legal order, which is now enriched in article 17 of the GDPR,¹¹³ yet non-EU States may have a different perspective on it.¹¹⁴ In this light, the ruling of the CJEU was beneficial for Google, as it held that it was not obliged to delete the links worldwide but only those related to the EU MS.¹¹⁵ At the same time, the CJEU underlined that the widespread development of internet use on a global scale will still affect the persons located within the EU, thus an international de-referencing system is desirable.¹¹⁶ Furthermore, the Court noted that despite the above necessity, the right to the protection of personal data is qualified and a balancing against other fundamental rights is mandatory.¹¹⁷ The balancing must be done having in mind the principle of proportionality and the function of this right in the society.¹¹⁸ The difficulty arises in finding a fair balance between the right to personal data protection and the right to freedom of information of internet users which is being understood uniquely in each nation of the world;¹¹⁹ and that is the reasoning of the CJEU in limiting the Right to be Forgotten only within the Union. As the CJEU ruled, the aim of the legislator didn't seem to be the application of the above right outside the borders of the European Union but the search engines should implement mechanisms that discourage or, if possible, stop internet users from the access to relevant links located outside the Union.¹²⁰ Finally, the

¹⁰⁹ *Ibid* para 30

¹¹⁰ *Ibid*

¹¹¹ *Ibid* para 31

¹¹² *Ibid* paras 33-34

¹¹³ *Ibid* para 66

¹¹⁴ *Ibid* para 59

¹¹⁵ *Ibid* para 64

¹¹⁶ *Ibid* para 57

¹¹⁷ *Ibid* para 60

¹¹⁸ *Ibid*

¹¹⁹ *Ibid*

¹²⁰ *Ibid* para 70

CJEU left once again the discretion to the MS and their competent authorities to find the right balance between freedom of information and personal data, giving the possibility for a global de-referencing through their national laws.¹²¹ As the CJEU stated, there is no requirement for global de-referencing under the Directive and subsequently the Regulation, yet such right is not prohibited.¹²² On the contrary, although difficult, it is an essential need in order not to diminish the “Right to be Forgotten”.

In light of the foregoing, the C-507/17 case is problematic and controversial. As the adoption of GDPR aims to enhance the right to personal data protection, by having the CJEU ruling limiting the application of the Right to be Forgotten only within the European Borders, this may weaken the scope of the GDPR.¹²³ Yet, by leaving the door open for the MS to find their own mechanisms for a global application of this right, it seems that the CJEU’s view is to follow the path for an international harmonization despite its obstacles.¹²⁴ Undoubtedly, the public interest and the right in accessing information should not be eliminated or underestimated in the effort of the above protection. Both are fundamental rights, of huge importance in a democratic society. And as the CJEU stated, those vary not only from one MS to another but also to the nations outside the European concept;¹²⁵ hence the application of both rights, differ in each jurisdiction. Consequently, nations must weigh up the above conflicting rights according to the particular circumstances of their country.

On the same date, the CJEU examined another case C-136/17, *G.C. and Others v. CNIL*, which was a natural consequence of the “Google Spain” Case, that led to a massive number of requests for applying the right inferred from this judgment, known as the Right to be Forgotten. In the C-136/17 Case, following a similar line to the C-507/17 Case, the CJEU faced preliminary questions for an appeal before the French Council of States. The reason was that CNIL refused to notify Google for removing sensitive data from its links, thus the individuals affected took actions against CNIL.¹²⁶ Among the questions referred to the CJEU was whether the obligation of de-referencing

¹²¹ *Ibid* para 72

¹²² *Ibid* para 64

¹²³ *Ibid*

¹²⁴ *Ibid* para 72

¹²⁵ *Ibid* para 60

¹²⁶ Case C-136/17, *G.C. and Others v. CNIL* [2019] para 2

for requests related to information on a web page that contain sensitive data applies also to search engine operators.¹²⁷ In other words, if the prohibition for the processing of personal data, under the EU legal order, with any exceptions provided, is extended to those operators.¹²⁸ And the exception in this case, was the journalistic exception as well as its implementation considering the de-referencing of journalistic material.¹²⁹ The CJEU found that the obligations under the EU Data Protection Law, referring to the processing of sensitive data are extended to search engine operators by the reason that their activities fall into the definition of processing.¹³⁰ Within the above, the CJEU differentiated the search engine operator, which provides only the links for the access, from a website publisher that places the data online.¹³¹ Nonetheless, this is not diminishing the liability of the search engines to comply with the Directive since their actions affect the right to privacy and personal data protection.¹³² As the law prescribes, there is a prohibition in processing sensitive data, which is subject to exceptions, that must also be applied by the search engines.¹³³ Elaborating further, the Court pointed out that the compliance with the requirement of de-referencing the sensitive data, is neither automatic nor systematic. What must be done on behalf of search engine operators when receiving an application for de-referencing, is to balance the right to personal data protection and the right to freedom of information of internet users.¹³⁴ Thus, the relevant factors that must be examined are the nature of the contested information, its accuracy or the possibility of being outdated, the impact on the person's private life and the public interest in receiving that information.¹³⁵ Furthermore, the CJEU held that information related to criminal convictions and offences subject to a trial or an investigation against the individual, fall also under the scope of Data Protection Law, irrespective of their result.¹³⁶ Accordingly, the search engine operator when faces an individual's request for de-referencing, has to analyze whether the related

¹²⁷ *Ibid* para 31

¹²⁸ *Ibid*

¹²⁹ *Ibid*

¹³⁰ *Ibid* para 35

¹³¹ *Ibid* para 36

¹³² *Ibid* para 37

¹³³ *Ibid* para 31

¹³⁴ *Ibid* para 66

¹³⁵ *Ibid* para 66

¹³⁶ *Ibid* para 72

information is essential for the protection of the freedom of information of internet users or whether it interferes with the privacy right of the requestor; the consequences of the publicized information must be taken into account.¹³⁷ Among those considerations, the assessment must be done having in mind the gravity of the offensive act, how much time has passed since then, the result of the proceedings, the role of the affected individuals in the society, their past behavior and the existence of public interest at the precise time of the request.¹³⁸ How the publication is formed and the content of it is also relevant.¹³⁹ Additionally, the CJEU imposed a duty to search engine operators in the light of the above, which is to maintain accurate data on their links and to follow the principle of lawfulness.¹⁴⁰ All in all, according to Advocate General Szpunar,¹⁴¹ the search engine operators must reconcile the fundamental rights of privacy and personal data protection with the right of information of the internet users, considering at the same time if the contested information is related to the well-known journalistic exception.¹⁴²

The abovementioned cases challenge once again the right to private life and the protection of personal data with the right to freedom of expression and information. Those fundamental rights are separated by a thin thread because of their immense importance in the society, thus there will be a frequent conflict between them. What is more difficult to manage is their reconciliation in the era of the Internet and its transnational nature.¹⁴³ Although the GDPR aims to enhance the protection of the personal data and the Right to be Forgotten, the fear of restricting the right to freedom of expression and information exists; hence the CJEU with the above judgments tried to limit the extraterritorial impact of the right to be forgotten, but still left the door open for a global recognition of this right.

¹³⁷ *Ibid* paras 76-77

¹³⁸ *Ibid* para 77

¹³⁹ *Ibid*

¹⁴⁰ *Ibid* paras 79-80

¹⁴¹ Advocate General at the Court of Justice since 23 October 2013

¹⁴² Helme, Ian, *The Right to be Forgotten Back in the CJEU: Advocate General Opinions on Sensitive Personal Data and the Geographical Scope of de-Referencing*, (Matrix Chambers 2019), <<https://www.matrixlaw.co.uk/resource/the-right-to-be-forgotten-back-in-the-cjeu-advocate-general-opinions-on-sensitive-personal-data-and-the-geographical-scope-of-de-referencing-ian-helme/>>, accessed 8 January 2020

¹⁴³ *Ibid*

5.1.4 Journalism and Household Exemption

Going a step forward, regarding the exemptions allowed by article 9 of the Directive, the CJEU in its judgment C-345/17, was challenged to reconcile the right to personal data protection with the right to freedom of expression. This case concerned a video publication on YouTube by Mr. Buivids, showing police officers acting improperly in their working environment. Hence, a complaint against him was filed because the police officers could be recognized since the video was showing their faces. Due to this fact, Mr. Buivids was asked to delete the video.¹⁴⁴ Mr. Buivides claimed that he deemed the actions of those public guards of our society inappropriate and illegal,¹⁴⁵ and the publication of the video was to awake the community;¹⁴⁶ therefore he was covered by the journalistic exception of the Directive that was valid at that time, which is aligned with the scope of the new GDPR. Following that, the Latvian Supreme Court referred to CJEU for a preliminary ruling to specify the arguments mentioned; if the case was under Data Protection Law and if the publication was falling under the journalistic exception.¹⁴⁷ On the first question, there was no doubt that it was falling under the scope of the directive as it constituted processing by automated means, and the persons in the video were identifiable, giving its reasoning extensively.¹⁴⁸ The crucial part though that concerns us, was the second questioning, whether they could apply the journalistic exception in favour of Mr. Buivids. The court notably stated that the protection of personal data is essential but we must not disregard other fundamental rights such as freedom of expression, and on that account, a fair balancing between them is needed,¹⁴⁹ having in mind the broad definition of journalism.¹⁵⁰ The interpretation of journalistic activities is not limited to professionals but, as mentioned at the beginning of this thesis, to each individual “*that is engaged in journalism*”¹⁵¹. In this case, the decision must be taken based on the individuals’ intention, if the only purpose of the publication is to disseminate their view for the information to the society.¹⁵² A case-by-case analysis

¹⁴⁴ Case C-345/17, *Sergejs Buivids v. Datu valsts inspekcija* [2019] EU:C:2019:122, paras 15-16

¹⁴⁵ *Ibid* para 18

¹⁴⁶ *Ibid*

¹⁴⁷ *Ibid* para 27

¹⁴⁸ *Ibid* paras 29-30

¹⁴⁹ *Ibid* para 50

¹⁵⁰ *Ibid* para 51

¹⁵¹ *Ibid* para 52

¹⁵² *Ibid* para 62

must be done and any limitation of the right to protect personal data comes with the need to reconcile it with the fundamental right of freedom of expression and only to the extent that this is unavoidable.¹⁵³ Another exemption that could be applicable in this case was the household exception, which ceases the applicability of today's Regulation for data protection. However, the accessibility to watch the video from an undefined number of people makes the derogation impossible on that base.¹⁵⁴

Despite that the case was delivered before the adoption of GDPR, the guidelines would be similar, as the article 9 of the Directive was almost the same as today's article of the Regulation, article 85, which leaves the discretion to strike the balance on the abovementioned fundamental rights on the MS and their definitions. Nevertheless, GDPR applicability not only to professionals but also to amateurs is a red alarm that anything we do as individuals in our everyday life through the internet, which is the most widespread medium nowadays, must be filtered and limited to close friends, to avoid being exposed to data protection breach. So the household exception is of huge importance,¹⁵⁵ finding a balance with the right to freedom of expression when this challenge comes at stake. Staying focused on the core of our subject, any processing of personal data for journalism in its broad interpretation must be legitimate as it comes to limit the privacy of the data subject. Conclusively, today, where every action on the internet entails data processing, an upload of a video similar to the one uploaded by Mr. Buivids, would breach the right to privacy.

5.2 Implementing ECtHR judgments

The immense amount of judgments of the ECtHR has given rise to develop and reinforce the European Legislation to respond adequately in the new modernized era that creates challenges to Human Rights across the Union.¹⁵⁶ This chapter will touch only two rulings of its case law related to the tension of personal data protection against the right to freedom of expression.

¹⁵³ *Ibid* para 64

¹⁵⁴ *Ibid* para 42

¹⁵⁵ Regulation (EU) 2016/679 of the European Parliament and of the Council, (General Data Protection Regulation) [2016] OJ L 119, Recital 18

¹⁵⁶ Council of Europe, The European Convention on Human Rights, *Landmark Judgments*, <<https://www.coe.int/en/web/human-rights-convention/landmark-judgments>>, accessed 10 January 2020.

5.2.1 Biriuk v. Lithuania

A burning issue for the ECtHR is the protection of private life and any violation of it is condemned.¹⁵⁷ This was the ruling of the court in the case of Biriuk v. Lithuania. As seen above, a critical prerequisite of balancing the right to freedom of expression against the privacy right is if any disclosure of personal information contributes to the public interest. In this case, there was a publication in a newspaper that Biriuk was accused to be a threat to the village she lived in as she was HIV positive, and this was confirmed by the hospital staff.¹⁵⁸ Furthermore, the newspaper's article improperly criticized her and contested her moral values.¹⁵⁹ It was unambiguous that the newspaper violated article 8 and precisely the sensitive personal data related to Biriuk that should be subject to further protection as they are fundamental rights of notorious importance.¹⁶⁰ The disclosure of the medical data of hers would obviously be harmful not only for her personal daily life but also would decrease the possibilities of her employment. To any further extent she would be marked by the society and as the newspaper wrote, as a "threat";¹⁶¹ a humiliating article with undesirable consequences. The court undoubtedly found that this violation could not be justified as a contribution of public interest. The personal data of hers were an essential element for the protection of her private life, hence the action of the local newspaper breached her privacy, and the hospital missed to achieve the protection of medical confidentiality.¹⁶² MS have the obligation under the ECHR to protect effectively the private life of their citizens and thus, Lithuania failed to comply with this.¹⁶³ The allegation that this would protect the people living nearby, meaning that it was of public interest could not be supported, and instead, because of the lack of knowledge related to sexually transmitted diseases would cause chaos to the village; consequently be harmful to the individual.¹⁶⁴ The disseminated information according to the court's judgment could not be considered lawful as a

¹⁵⁷ *Biriuk v. Lithuania*, App. no 23373/03 (ECHR 25 November 2008) para 47

¹⁵⁸ *Ibid* paras 5-6

¹⁵⁹ European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Data Protection Law*, (Publications Office of the European Union, 2018), page 61

¹⁶⁰ *Ibid*

¹⁶¹ *Biriuk v. Lithuania*, App. no 23373/03 (ECHR 25 November 2008) para 6

¹⁶² *Ibid* para 43

¹⁶³ *Ibid* para 46

¹⁶⁴ *Ibid* para 10

debate of public interest.¹⁶⁵ Extensively analysed, the right to freedom of expression and the right to privacy and personal data are two fundamental rights protected equally and the one should not overlap the other.¹⁶⁶ This case should undoubtedly lean in favour of personal data protection; their sensitivity and the negative implication when publicized should not even question the fact of disseminating that information and it is profoundly apparent that the protection of the rights of others does not exist. The newspaper's aim was the profit and the publication would only increase the thirst of the public for the provided information.¹⁶⁷ The Biriuk case is not subject to any doubt of how essential it is to protect private life and personal data of individuals and any interference should be reasonably justified.

5.2.2 Freedom of arts

Freedom of expression is an integral part of a democratic society. Nevertheless, it is not only about publications of articles, photos or videos. It can be found in the notion of arts where many people create to express their feelings, opinions, and ideas. Music, literature, and paintings are a few examples of these. In the case of *Vereinigung Bildender Künstler v. Austria*, the ECtHR was called to clarify the debate of public interest connected to the above.¹⁶⁸ In this case, an exhibition of paintings took place in a gallery in Austria, where the works were of contemporary art and its subject was the freedom of expression of the artists.¹⁶⁹ In this exhibition, there was a painting portraying public persons in offending positions, showing them in sexual activities.¹⁷⁰ One of them, Mr. Meischberger (Mr. M), started proceedings against the exhibition's association with a request of forbidding the publication of the painting and its exhibition, by the reasoning that this work of art was underestimating his public standing and that dropped innuendos about his sexual life.¹⁷¹ At first, his request was accepted by the national court but the ECtHR had a different opinion in this balancing exercise between freedom of

¹⁶⁵ *Ibid* para 16

¹⁶⁶ *Ibid* para 20

¹⁶⁷ *Ibid* para 42

¹⁶⁸ *Vereinigung Bildender Künstler v. Austria*, App. no 68354/01, (ECHR 25 January 2007)

¹⁶⁹ *Ibid* para 7

¹⁷⁰ *Ibid* para 8

¹⁷¹ *Ibid* para 13

expression and privacy;¹⁷² In contradiction with the most of the cases analysed previously in this thesis, the right to freedom of expression is prevailing over the personal life of the individuals. As repeatedly stated, MS should not restrict the right to freedom of expression, and if they do so any interference must be justified.¹⁷³ The artists are expressing their views and feelings through works of art, those creations reflect their opinions and thus we could not restrain this right from them unduly; any interference should be a result of careful examination.¹⁷⁴ The painting, as the court illustrated, depicted Mr. M in an extremely imaginary way, in a satirical form that could not even reach reality, a humorous way that aimed to criticize the political conduct of him. As such, this exaggeration could not reveal his personal preferences or intrude on his privacy. Those caricatures were meant to challenge the public figure of Mr. M, and this was lawful, because as being a public person, intentionally he is exposed to social comments.¹⁷⁵ Consequently, the decision of the Austrian Court was violating the right to freedom of expression of the association, as it was not proportionate to the aim seeking to achieve, therefore not essential for a democratic regime.¹⁷⁶ As said, freedom of expression is also extended to expressions that may be offensive, outrageous or even disturbing.¹⁷⁷

The consideration of whether there is a fair balancing of the conflicting rights is obvious. Noted in several cases, a fact analysis must be done to reconcile the various rights at stake, and especially when those affect individuals' lives. But how would the Court decide today? This painting with Mr. M and many others being depicted on it and being identifiable are subject of consideration under the GDPR. Nowadays, under article 85 of the Regulation, the margin of appreciation is given to the MS to strike this balance. I believe that the autonomy of each person and the right to the protection of his personal data in the abovementioned case could prevail over freedom of the arts because this painting was offensive and unpleasant over the limits. His opinion could be expressed more moderately and instead of using photos of their faces, paint them in the

¹⁷² *Ibid* paras 13-14

¹⁷³ *Ibid* para 21

¹⁷⁴ *Ibid* para 26

¹⁷⁵ *Ibid* paras 33-34

¹⁷⁶ *Ibid* para 38

¹⁷⁷ *Ibid* para 26

same caricature way as their bodies so as not to be easily recognizable. Nevertheless, freedom of expression and precisely freedom of arts, must not be underestimated as it is an essential element of a democratic society, yet carrying duties and responsibilities. Despite my view, as Eleni Polymenopoulou¹⁷⁸ examined, the ECtHR in its case law supports more and more the right of freedom of the arts with the satirical way of expression being prevailed over other fundamental rights.¹⁷⁹

5.3 CYPRIOT DECISIONS

5.3.1 Decision 192/2018: Decision of the Commissioner for Personal Data Protection, Subject: Complaint for the publication and processing of Personal Data by Breikot Management Ltd

As previously stated, the Regulation left the discretion to the MS in implementing its obligations and seek for the right balance of the contradicting values falling under article 85. In the Decision 192/2018(Breikot case) the Commissioner for Personal Data Protection in Cyprus followed the guidelines of the above milestone judgments to reach its ruling. In this case, the complainants objected to a publication made by Breikot Management Ltd (Breikot) in a printed newspaper, which included their full names and photos.¹⁸⁰ The complainants alleged, among others, the lack of public interest. In response to the arguments, Breikot stated that the publication was associated with a well-known Cypriot Family, and therefore the public interest was obvious. Moreover, the defendant claimed that the used photos and two relevant decisions were already uploaded on the internet, in a public domain, and thus they were publicly available.¹⁸¹

The commissioner, having the facts of the case, initially acknowledged that the publication of the names and photos is regarded as processing of personal data in light of article 4(2) of the GDPR.¹⁸² Mentioning article 29(1) of Law 125(I) of 2018 as

¹⁷⁸ Lecturer-in-Law, Brunel University

¹⁷⁹ Polymenopoulou, Eleni, *Does One Swallow Make a Spring?* Artistic and Literary Freedom at the European Court of Human Rights, *Human Rights Law Review* 2016, pages 511–539

¹⁸⁰ Decision of the Commissioner for Personal Data Protection, 192/2018, *Complaint for Disclosure and Personal Data Processing from Breikot Management Ltd*, <[http://www.dataprotection.gov.cy/dataprotection/dataprotection.nsf/BACBDB52BA83F8DEC22583F2001E4EE2/\\$file/%CE%91%CE%9D%CE%9F%CE%9D.%20%CE%91%CE%A0%CE%9F%CE%A6%CE%91%CE%A3%CE%97%20Breikot.pdf](http://www.dataprotection.gov.cy/dataprotection/dataprotection.nsf/BACBDB52BA83F8DEC22583F2001E4EE2/$file/%CE%91%CE%9D%CE%9F%CE%9D.%20%CE%91%CE%A0%CE%9F%CE%A6%CE%91%CE%A3%CE%97%20Breikot.pdf)>, accessed 05/11/2019

¹⁸¹ *Ibid*

¹⁸² *Ibid* para 2(1)

enlightened previously, and the discretion of MS to seek a fair balance between freedom of expression and the protection of personal data, the commissioner highlighted that the right to personal data is a qualified right. For that reason, a main principle must be applied; the principle of proportionality. Thus, the right has to be reconciled with other fundamental rights and its function to society.¹⁸³ The Commissioner, to approach the case, also referred to a decision of the Hellenic Data protection authority, which states among others that an *ad hoc* balancing of the conflicting interests must happen, having in mind the principle of proportionality in order for both rights to preserve their scope.¹⁸⁴ Furthermore, the commissioner, linked the case with the notorious aforementioned decision "Google Spain", where the CJEU, referred to the journalistic exception of the GDPR, noting that its purpose is to give the needed freedom to the press to implement its commitment to inform the society in public interest matters.¹⁸⁵ Thus, in the Breikot case where the public interest is missing, the protection of privacy prevails.¹⁸⁶

Moreover, the commissioner could not forget to mention the decision that we discussed at large previously, C-73/07.¹⁸⁷ Every court that seeks the balance between freedom of expression and personal data protection, must always have in mind, before limiting the freedom of expression, whether the information which concerns us, already exists in a public domain that is publicly accessible.¹⁸⁸ In both cases mentioned above, the CJEU emphasized that even if the personal data are already publicized, it does not change the need for their protection. The Data Protection Commissioner, taking into account the facts of the case and the jurisprudence of the Court, concluded that, as indeed the actions of the complainants had to do with public works, the full names of them should be publicized because of the existence of public interest.¹⁸⁹ On the contrary, the publication of their photographs was unnecessary as the purpose need to achieve, which was the information of the public concerning those works, could be

¹⁸³ *Ibid* para 2(4)

¹⁸⁴ *Ibid* para 2(7)

¹⁸⁵ *Ibid* para 2(9)

¹⁸⁶ *Ibid*

¹⁸⁷ *Ibid* para 2(11)

¹⁸⁸ *Ibid*

¹⁸⁹ *Ibid* 3(2)

accomplished only with the names' disclosure. The publication of the photos was over and above the aim of seeking to achieve.¹⁹⁰

As seen in the above case, the jurisprudence of the court and the legislation is an essential part of finding a fair balance between the aforementioned rights. Nevertheless, the proportionality test is appropriate to find the line among those rights, and what we conceive from this is that any deviation or limitation of the rights must not exceed the necessary for the completion of the intended purpose. In conclusion, the journalistic exception provided by article 85 of GDPR can be applied only to the extent that does not exceed the arising need.

5.3.2 Complaint 135/2018, "*Publication of names and photos of police investigators at Larnaca Airport from the newspaper "Politis"*".

Another Cypriot case that was found before the Data Protection Commissioner was the complaint 135/2018 that has as a subject "*Publication of names and photos of police investigators at Larnaca Airport from the newspaper "Politis"*."¹⁹¹ The complaint was against a publication of the newspaper, which disclosed the names of two police officers and their photos. The police officers were subject to criticism by the newspaper for pestering a Turkish Cypriot old lady,¹⁹² treating her in a cruel, inhuman and degrading way. And this was the reasoning of the newspaper for the publication of the complainants' names, to increase the awareness of the competent authorities referring to the concerned issue.¹⁹³ The commissioner firstly stated that the actions of the newspaper were processing of personal data and it should comply with certain conditions.¹⁹⁴ Among others, she referred to article 85 of the GDPR and the discretion of the MS to balance freedom of expression with the right to protection of personal data.¹⁹⁵ Following that, the reference to article 29(1) of Law 125(I) 2018 was mandatory

¹⁹⁰ *Ibid* 4(2)

¹⁹¹ Complaint no 135/2018, "*Publication of names and photos of police investigators at Larnaca Airport from the newspaper "Politis"*.", (09 January 2019), <[http://www.dataprotection.gov.cy/dataprotection/dataprotection.nsf/all/2566119727D4B95CC22583A2003987DF/\\$file/complaint%20135-2018-efimerida%20politis-apofasi.pdf?openelement](http://www.dataprotection.gov.cy/dataprotection/dataprotection.nsf/all/2566119727D4B95CC22583A2003987DF/$file/complaint%20135-2018-efimerida%20politis-apofasi.pdf?openelement)>, accessed 15 November 2019

¹⁹² *Ibid* para 1(1)

¹⁹³ *Ibid* para 1(5)

¹⁹⁴ *Ibid* para 2(4)

¹⁹⁵ *Ibid* para 2(5)

to strike this balance. She also mentioned the case *Bavarian Lager Co. v. Commission* where the commission ensured that despite the persons at issue are workers on the public sector and the processing was of public interest, the Directive is still applicable; this approach was further upheld to the case C-101/01 Lindqvist.¹⁹⁶ In this case, we had also a reference to article 19 of the Cypriot Constitution for the protection of freedom of expression, highlighting that the two rights must be reconciled, with prevailing one the freedom of expression to satisfy the public interest, only when it does not violate private life.¹⁹⁷ Taking all these into account, the decision was that the disclosure of the names and the photos of the police officers was beyond the necessary; the journalistic purpose as aforementioned in this thesis is to transmit information and ideas, and this publication was more than that. The aim could be achieved with blurred photos and just the initials of the names, and still, provide the essential for the public interest.¹⁹⁸

Examining the above cases, where the Cypriot Data Protection Commissioner was called to decide whether the processing of personal data was legitimate for exercising journalistic activities, we observe that she followed the guidelines of the European Law and the Cypriot Law that was adopted after the discretion given by the article 85 of GDPR. In order to strike a balance, importance is given to the principle of proportionality and the personal data minimization; that means the processing can happen only to the extent that completes the needed purpose and nothing more than that. If the purpose can be achieved by sacrificing less, then we should go that way. Another significant factor to consider when balancing the above is if the data subject is a public person of society.¹⁹⁹ In this case, the right to freedom of expression was more intensive than the need for personal data protection because the intention was to fulfill the need to inform the public.²⁰⁰ The journalists, as public watchdogs, are covered by their duty to transmit their opinions and ideas and criticize what is happening around the world and if the public figures can deal properly with their given duties and discretions.²⁰¹ Nevertheless, this is not an unlimited right, even if it is related to matters

¹⁹⁶ *Ibid* para 2(11)

¹⁹⁷ *Ibid* para 2(12)

¹⁹⁸ *Ibid* para 5(3)

¹⁹⁹ Kotsalis L./Menoudakos K, *General Data protection Regulation(GDPR)*, (Law Library 2018), page 74

²⁰⁰ *Ibid*

²⁰¹ Complaint no 135/2018, "*Publication of names and photos of police investigators at Larnaca Airport from the newspaper "Politis".*", (09 January 2019), para 2(15),

that are of significant importance, or severe situations; the right of the press to inform must be at the same time in compliance with specific obligations.²⁰²

CHAPTER 6: TWO SIDES OF THE SAME COIN

Despite the above conflicting situations, personal data protection and freedom of expression are interlinked and can be considered “*as two sides of the same coin*”. Without the effective protection of the one, we cannot guarantee the other since in this information society that we live in almost all of our communications happen through technology, and the tracking of activities is widespread. Having this as a fact, people will be afraid that they are being monitored and their private activities are subject to interference; as such will avoid to freely express themselves, their opinions, or disseminate and receive information.²⁰³ A relevant example to this relationship is the case of *C-203/15 (Tele2 Sverige AB v Post- och Telestyrelsen)*.²⁰⁴ A burning issue that arose in this case, was that the right to privacy and personal data was violated by the Data Retention Directive which retained position data and traffic data.²⁰⁵ By the holding of the personal data of individuals without informing them and obtaining their consent, it had as a consequence the creation of a feeling of fear that their private sphere was monitored in every step.²⁰⁶ The CJEU found that this retention was not only in breach with articles 7 and 8 of the Charter but also with the right to freedom of expression as the feeling that they were monitored continually, was affecting negatively their communication by electronic means. Thus, it has as a result to withhold them from exercising this fundamental right,²⁰⁷ which is necessary for every democratic nation, and

<[http://www.dataprotection.gov.cy/dataprotection/dataprotection.nsf/all/2566119727D4B95CC22583A2003987DF/\\$file/complaint%20135-2018-efimerida%20politis-apofasi.pdf?openelement](http://www.dataprotection.gov.cy/dataprotection/dataprotection.nsf/all/2566119727D4B95CC22583A2003987DF/$file/complaint%20135-2018-efimerida%20politis-apofasi.pdf?openelement)>, accessed 15/11/2019

²⁰² *Ibid*

²⁰³ Nyst, Carly, *Two Sides of the Same Coin – the Right to Privacy and Freedom of Expression*, Privacy International (October 2013), <<https://privacyinternational.org/blog/1111/two-sides-same-coin-right-privacy-and-freedom-expression>> accessed 28 November 2019

²⁰⁴ Case C-203/15, *Tele2 Sverige AB v Post- och telestyrelsen and Secretary of State for the Home Department v Tom Watson and Others* [2016] EU:C:2016:970,

²⁰⁵ European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Data Protection Law*, (Publications Office of the European Union, 2018), page 61

²⁰⁶ *Ibid* page 62

²⁰⁷ Case C-203/15, *Tele2 Sverige AB v Post- och telestyrelsen and Secretary of State for the Home Department v Tom Watson and Others* [2016] EU:C:2016:970, paras 92-93

any restriction from its exercise should be lawful and reasonably justified.²⁰⁸ Consequently, enforcing strict protection in the light of the Data Retention Directive limits the right to privacy and thus, the right to freedom of expression. Therefore, the protection of privacy and personal data is necessary to guarantee the right arising from the article 11 of the Charter.²⁰⁹

This case is an overturn on what we described in this thesis extensively; The findings of the court in each occasion for the conflict of the above rights are not absolute, and not always incompatible with each other. Both rights are indispensable in our society; they are fundamental rights that each one separately and together deserve equal protection to allow people to enjoy their benefits.²¹⁰ The autonomy of the individuals without any intrusion is an essential component for preserving their privacy and freedom of expression, as well as be able to create and hold their own opinions or even disseminate them, in every sector of their life.²¹¹ Moreover, any interference to the private sphere of the individuals by observing their lives, limits them from expressing themselves freely. The same is applicable for the journalists if they are subject to surveillance or control by the state, which will prevent them from exercising their activities in this sector and their freedom of expression will be eliminated from this constant monitoring.²¹² As mentioned above, online surveillance is possible in every action by the providers even without our consent. The adverse effect of this is obvious; deprivation of privacy and fear of exercising the right to freedom of expression. Subsequently, each of those rights is necessary for preserving the other.²¹³ Nevertheless, the link among those rights is mostly entailed in the communications sector, where violation of the one damages the other; thus, individuals hesitate to involve and take part in social life. This illustrates the importance, the necessity and the great achievement of the European Union and the Charter of Human Rights for their protection. In this sense, the innovation of GDPR, which allows anonymity of expression

²⁰⁸ *Ibid* para 94

²⁰⁹ European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Data Protection Law*, (Publications Office of the European Union, 2018), page 62

²¹⁰ Nyst, Carly, *Two Sides of the Same Coin – the Right to Privacy and Freedom of Expression*, Privacy International, October 2013, <<https://privacyinternational.org/blog/1111/two-sides-same-coin-right-privacy-and-freedom-expression>>, accessed 28 November 2019

²¹¹ *Ibid*

²¹² *Ibid*

²¹³ *Ibid*

in every channel through the ability of encryption, boosts this right and consequently adds to the safeguarding of a democratic society, preserving the human dignity.²¹⁴ Of course, almost every Act has an adverse effect, and a major concern in the encryption and anonymity concept is that illegal actions may be supported. Nonetheless, the law provided adequate safeguards on those actions so the encryption is not absolute. As people can maintain their anonymity, without interference in their private sphere, the enhancement of the right to freedom of expression is a fact. As we have seen, the right to personal data and freedom of expression are not always in conflict; they sometimes need each other to survive, and this need arises mostly in the communication sector.

Conclusions

In an era where the modern world faces many challenges and violations in every fundamental freedom and value because of the radical changes around us, the quality of our lives is at risk. Those inherent Human Rights are an integral part of preserving this quality and we must not underestimate the efforts of the European Union and the International Law to enhance the protection of those rights through its legislation. Thus, having these constant efforts, we would expect that each fundamental right, which is subject to equal protection, would not be able to damage or violate the other. Nevertheless, as we extensively discussed above, sometimes the conflict between some of those integral values is inevitable not only because of their nature but also the information technology and development that arose in the last years. As described in this thesis, one of the major conflicts that comes at stake is the battle between the right to freedom of expression and the right to the protection of personal data, subsequently the right to privacy. A crucial question up to the above is whether the Protection of personal data can restrict the exercise of the right to freedom of expression. In the year 2019, the expression of opinions and ideas and the dissemination of information are not limited in a printed paper but can be uploaded on the internet, be accessible to an unlimited number of people and stay there for an undefined time. This easy and

²¹⁴ Homo Digitalis, *Report on the Right to Privacy in the Digital Age*, 2018, <<https://www.ohchr.org/Documents/Issues/DigitalAge/ReportPrivacyinDigitalAge/HomoDigitalis.pdf>> accessed 30 November 2019.

effortless way of exercising the right to freedom of expression generates risks to privacy and the protection of personal data.²¹⁵ Nowadays, in every modern communication method and the use of social media, the processing of personal data is not missing.²¹⁶ And that is the reason for the creation, or in other words, the replacement of the Directive and the adoption of GDPR, to fit the digital period of today. The legislator acknowledging that the right to freedom of expression and the right to the protection of personal data are equivalent rights and none of the two is subject to better protection, laid down article 85 of this Regulation. Knowing that those two values are equivalent and must be respected in the same way and with the same importance, we conceive that the protection of the one cannot prevail over the other. Hence, what must be done is to find the line in which both rights can work in parallel; their fair balancing is mandatory. There is no single answer of how to tackle the conflict between the above; unlimited aspects exist that we should consider. Having the unique facts of each case, sometimes the fair balancing may be to limit the exercise of freedom of expression, or to accept interference on the individuals' privacy and hence their personal data. The CJEU in the case *Bodil Lindqvist*, in its ruling stated that through the Directive we perceive that a prevailing step is given to the right of the protection of personal data.²¹⁷ Furthermore, in the light of today's norm, the GDPR, where the processing of data is possible only when it is compatible with the provisions of the Regulation and only if the exemptions laid down are applicable, the priority is given to the data protection. Albeit, the aspects for consideration are unlimited and the final step is left to the MS to reach this balance and find in which right must be given more weight in each case. MS are obliged to reconcile those rights having in mind the discretion given under article 85 of the Regulation, interpreting it step by step as analysed on the above cases. The first step must be to define the notion of journalism and then its necessity for this balancing.

A reason for allowing interference with the right to protect personal data is whether the person that is subject to this intrusion is a public figure, and as said, public persons, having this capacity, are exposed to this interference. Moreover, the

²¹⁵ Kotsalis L./Menoudakos K, *General Data protection Regulation(GDPR)*, (Law Library 2018), page 71

²¹⁶ Jozwiak, Magdalena, *Balancing the Rights to Data Protection and Freedom of Expression and Information by the Court of Justice of the European Union, The Vulnerability of Rights in an Online Context*, 2016, page 406

²¹⁷ Case C-101/01, *Bodil Lindqvist v Åklagarkammaren i Jönköping*, [2003] EU:C:2003:596, para 82

interference on the right to privacy arises lawfully when the matter at stake is a matter of public interest. Nevertheless, in the cases where the personal data accept any intrusion, the principle of proportionality should be respected, and as such their accuracy. On the other side of the coin, a crucial element on this balancing is the nature of those intruded data. The more sensitive they are, the more protection they gain.

Conclusively, taking into account the jurisprudence of the Courts evaluated in this thesis, the protection of personal data seems to have an advantage against the right to freedom of expression, especially in the modern technologies where the communication has developed massively, and the personal data are vulnerable to increased threats. Nevertheless, we must not forget that the right to freedom of expression is essential and almost absolute to maintain a democratic nation, and this is the reason that creates the extensive need for the reconciliation of those two rights. At the same time, the right to protection of personal data and the right to freedom of expression are interlinked, mainly in the communications sector, and consequently, the adequate safeguard of the one safeguards the other. The guarantee of each Human Right, together with others, or separately, is indispensable for guaranteeing Human Life.

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